

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Reexamination of the Comparative Standards for)	MM Docket No. 95-31
Noncommercial Educational Applicants)	
)	
Association of America's Public Television)	
Stations' Motion for Stay of Low Power)	
Television Auction (No. 81))	

**FORMAL COMMENTS OF
SATELLITE BEACH COMMUNITY BROADCASTERS
TO SECOND FURTHER NOTICE OF PROPOSED RULEMAKING**

To the Commission:

Comes Now, Satellite Beach Community Broadcasters, ("Commenter") through counsel, with Formal Comments in the above-captioned rulemaking proceeding.

On February 25, 2002, The Federal Communications Commission adopted a *Second Further Notice of Proposed Rulemaking* seeking additional comment on the procedures the Commission should use to license "non-reserved" channels in which both commercial and noncommercial educational entities have an interest. In the year 2000, the Commission decided to resolve mutually exclusive applications between such entities by competitive bidding. As explained in the *Second Further Notice of Proposed Rulemaking*, the United States Court of Appeals for the D.C. Circuit has vacated that decision. The Commission now seeks additional comments to adopt new procedures to license non-reserved spectrum in which both commercial and noncommercial educational entities have an interest, consistent with the court's opinion, the FCC's statutory authority, and the FCC's responsibility to serve the public interest.

In it's *Second Further Notice of Proposed Rulemaking*, the Commission reviewed the history of its treatment of noncommercial educational ("NCE") broadcasters and broadcast channel applicants. It noted that it first seeks comment on the breadth of the statutory language that describes the entities that are exempt from auctions. This threshold issue is extremely important because it calls into question the very nature of the NCE station status. Specifically, Section 309(j)(2)(C) of the Communications Act states that the Commission's competitive bidding authority does not apply to "licenses or construction permits issued by the Commission . . . for

stations described in Section 397(6) of this Act.” Section 397(6) of the Communications Act defines the terms “noncommercial educational broadcast station” and “public broadcast station” as a radio or television broadcast station which “(A) under the rules and regulations of the Commission in effect on the effective date of this paragraph, is eligible to be licensed by the Commission as a noncommercial educational radio or television broadcast station and which is owned and operated by a public agency or nonprofit private foundation, corporation, or association; or (B) is owned and operated by a municipality and which transmits only noncommercial programs for education purposes.” Section 397(6) became effective November 2, 1978. Both at that time and currently, the Commission’s rules for the FM service stated that NCE stations “will be licensed only to a nonprofit educational organization and upon a showing that the station will be used for the advancement of an educational program.” Likewise, the Commission’s rules stated for the TV service that NCE stations “will be licensed only to nonprofit educational organizations upon a showing that the proposed stations will be used primarily to serve the educational needs of the community; for the advancement of educational programs; and to furnish a nonprofit and noncommercial television service.” Reading these eligibility requirements in the rules in tandem with the statutory exemption, the FCC requests comment on which applicants are exempt from competitive bidding and under what circumstances. Specifically, are all “nonprofit educational organizations” exempt from auctions whenever they apply for any broadcast license, or only when they make a “showing that the station will be used for the advancement of an educational program”? In other words, is the “showing” of an “educational program” or “service” requirement that appears in sections 73.503 and 73.621 of the Commission’s rules, part of the “eligibility” requirement that is incorporated by reference in section 397(6) of the Act? Or is the eligibility requirement referenced in section 397(6) only that the applicant be a “nonprofit educational organization”? If the latter is the case, a nonprofit educational organization could not participate in an auction for a broadcast license under any circumstances – even if it were applying to operate a commercial station. If the former is the case, a nonprofit educational organization could participate in an auction for a broadcast license if it does not make “a showing that the station will be used for the advancement of an educational program.” If a nonprofit educational organization may participate in an auction, is it precluded, once having obtained a broadcast license, from providing noncommercial educational service or from later converting to noncommercial educational operations? Is its transferee precluded from these activities?

The Commenter argues that the distinction the Commission is drawing is meaningless in actual practice. The act of “showing” an educational purpose is a wholly empty gesture. While the Commission requires such a showing from a NCE applicant as a condition to the processing of an NCE application, it has rarely if ever,

enforced that requirement after the license has been granted. As a matter of fact, the "Statement of Education Purpose" required by NCE construction permit applications is now the equivalent of boiler-plate language which can be entirely vague and meaningless, and often is. The staff merely checks, without questioning, the content of such a showing, to see if the statement has been included with the application. If the statement has been included, the processing of the application continues. The Commenter can find not one instance where NCE stations have been audited to ascertain whether the educational purpose is being implemented at any station in the United States. Furthermore, the Commenter cannot find one instance where the NCE station has been asked to refresh or update its showing of educational purpose. In the absence of any enforcement of the matter, it is rare to find any NCE station which airs any educational programming. Furthermore, there does not appear to be any definition of "educational" programming which is in any way meaningful or substantive which would give NCE stations any direction in the matter. For these reasons, the Commenter suggests that the FCC's quandary regarding the categorization of an NCE station based upon its submission of an educational "showing" is wasted effort. If the Commission should decide that an educational "showing" is required, most of the NCE stations will simply submit a meaningless educational "showing" and the issue will be resolved. If, on the other hand, the Commission decides that an educational showing will preclude NCE stations from participating at an auction, the Commission will be swamped with filings which rescind the vague and meaningless statements of educational purpose. If there is no working definition of "educational" programming and if there is no verification that the NCE stations are serving the educational needs of their communities of license, what is the purpose of making an issue of the distinction between stations which promise to broadcast educational programming and those which do not?

The Commission has long ignored the marketplace behavior of NCE stations in the view of this Commenter. For instance, just about anyone can form a non-profit corporation and, by answering the IRS questions properly, achieve 501(c)3 tax-exempt status. Almost anyone can call himself a foundation under such circumstances. Once these bases have been "touched", it's a simple matter to qualify for NCE status at the FCC. The application form requires a "statement of educational purpose" which needs to be no longer than a simple paragraph and requires no greater thought than assembling a grocery list...perhaps less. The applicant merely attaches an engineering exhibit and signs the application and waits for a construction permit grant. In most cases, the application is granted (assuming there is no unresolved mutual exclusivity issue) and the bogus foundation is in business. And how is the station used? Some play classical music. Some play religious music. There are Jazz stations, college rock stations, talk stations, beautiful music stations, country stations and almost every format available and completely indistinguishable from commercial broadcasting counterparts. These NCE stations run

advertisements. Many are careful to avoid the so-called “call to action” prohibition but many don’t even bother to adhere to that rule. Some of these stations air more than ten minutes each hour of “announcements” which are nothing more than commercial matter carefully worded to conform with the letter of existing law while skirting its spirit. The owners of these stations pay themselves as much of a salary as possible but pay nothing for their spectrum. Where is the educational nature in these stations? Where is the unique service to the community which the NCE charter was designed to assure? In Washington D.C., for example, WAMU-FM airs NPR news programming and devotes the bulk of its airtime to bluegrass music entertainment. It would be quite a stretch to conclude that NPR news programs are any more educational than those of CBS, ABC or NBC. Bluegrass music is nothing but entertainment. The talk shows offered by WAMU-FM may be interesting but are no more educational or informative than any talk shows offered by WMAL or WRC, which are commercial stations. These examples are offered to the Commission because they exist right in the FCC’s own back yard. NPR may consider itself a national treasure but what is the difference between NPR and NBC? Is NPR educational? In whose opinion would it be considered educational? Is NBC merely entertainment? Is the distinction meaningless? This Commenter argues that there may have been a noble purpose behind the rules which gave birth to the NCE services when the rules were first adopted but that nobility of purpose has long since been supplanted by 500 channels of cable TV, 200 channels of satellite radio, low-power FM, ten thousand commercial FM stations, the Internet and a host of special interest newspapers and periodicals.

If the FCC believes that NCE stations are supposed to be serving an educational purpose it should develop rules which include a realistic definition of “educational” programming and hold NCE stations accountable for airing such programs. The majority of the NCE broadcast day should be devoted to airing programs which meet that new definition of “educational” programming and all NCE stations should be required, as a condition of their licenses, to demonstrate how their educational programming has served their communities of license. The NCE stations should also be required to annually renew and, where necessary, revise their statements of educational purpose. The Commission should routinely audit NCE stations for compliance with these requirements and proceed to revoke the licenses of NCE stations which do not meet the criteria established for NCE operation. Otherwise, the distinction between NCE and commercial stations should be ended and the bandwidth auctioned and the money deposited into the nation’s treasury. As it stands, the American people are subsidizing hundreds of NCE stations which have strayed very far from the spirit of “non-commercial” and have no idea what an “educational” program really is because there is no working definition; all at a time when the American people have more options for special interest programming, from a plethora of sources commercial and otherwise, than ever before in

the history of mankind!

As far as this rulemaking is concerned, the Commission seeks comment on the following questions: are all “nonprofit educational organizations” exempt from auctions whenever they apply for any broadcast license, or only when they make a “showing that the station will be used for the advancement of an educational program”? In other words, is the “showing” of an “educational program” or “service” requirement that appears in sections 73.503 and 73.621 of the Commission’s rules, part of the “eligibility” requirement that is incorporated by reference in section 397(6) of the Act?

This Commenter believes that the “showing” of an “educational program” or “service” requirement that appears in sections 73.503 and 73.621 of the Commission’s rules should be viewed as part of the “eligibility” requirement that is incorporated by reference in section 397(6) of the Act. But the Commission needs to make the “showing” meaningful. It needs to develop a serious definition of “educational” programming. It must require NCE stations to actually devote a significant majority of airtime to real “educational” programs and limit the amount of entertainment or “fill” programming. It must seriously scrutinize the bona fides of the non-profit entities seeking licenses and establish a procedure which will weed-out sham foundations which merely exist in order to obtain a Commission license. It must develop audit and reporting requirements for NCE stations and require the NCE stations to annually renew their “showings” and to actively demonstrate how their recent broadcast activities have furthered their stated educational objectives. To do anything less is to subsidize a select group of applicants and licensees to the obvious disadvantage of other applicants and licensees. As it now stands, the NCE application and licensing program is a sham and cannot be continued in its present form. If it is considered illegal, for instance, to favor an applicant for a new FM station because he or she is black or Hispanic... if it is illegal to give a preference to an applicant because he or she represents a particular point of view... why is it *legal* to favor a group of people who do nothing more than set up non-profit corporations, obtain 501(C)3 status, and call themselves a foundation? Without requiring more than mere paperwork, empty gestures and legal formalities, the FCC is partner to a system which favors one broadcaster over another for which there is simply no rational basis in practice. The system needs to be fixed before we engage in the rhetoric of distinctions without a difference.


Notwithstanding the discussion, *supra*, this Commenter also seeks to respond to the “Options” presented by the Commission in its *Second Further Notice of Proposed Rulemaking* to resolve the competing interests of commercial and NCE entities for non-reserved spectrum. The Commission’s options are as follows: (1) holding NCE entities ineligible for licenses for non-reserved channels and frequencies; (2) permitting NCE entities

opportunities to acquire licenses for non-reserved channels and frequencies when there is no conflict with commercial entities; and (3) providing NCE entities opportunities to reserve additional channels in the Table of Allotments.

This Commenter believes that the public interest is best served by permitting legitimate NCE entities to apply for licenses on non-reserved channels and frequencies provided there is no conflict with commercial entities. All of these so-called NCE applicants had an ample opportunity to participate in the rulemaking proceedings which led to the allotment of each and every one of these new FM channels which are now subject to auction. In the vast majority of these rulemaking proceedings, not one NCE applicant filed a comment or a counter-proposal. Not one can claim to have been denied a chance to participate in the allocation process. These stations were allotted as "commercial" facilities. Not one was reserved for education use. There is no inherent unfairness by which a single one of these channels came into being. Not one NCE applicant can complain that it did not have a fair chance to participate. This Commenter believes that Option Two is also appropriate but believes that if there is no reserved channel available, the public interest is best served by allowing NCE applicants to reserve additional channels in the Table of Allotments. In all cases, the NCE applicant must be required to demonstrate that it is a legitimate entity and not just a convenient legal creation formed for the purpose of obtaining a NCE license. And, as stated above, the Commission should develop meaningful rules regarding the operation of NCE stations and end the sham which has been "spun" as our latest "national treasure".

Respectfully submitted,

Satellite Beach Community Broadcasters

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